Supreme Court, U.S.
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No. 92-1377

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

ROBERT IAN SHERMAN, and
RICHARD HARRY SHERMAN, a minor.

Petitioners,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21
OF WHEELING TOWNSHIP, LLOYD DESCARPENTRIE
(SCHOOL DISTRICT SUPERINTENDENT),
DR. FERNE GARRETT (PRINCIPAL OF RILEY SCHOOL).

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), no longer supplies the calculus applicable to Establishment Clause cases (i.e. that *Lee v. Weisman*, 505 U.S. , 120 L. Ed 2d 467 (1992), "concluded without renewing *Lemon's* lease")?

2. Did the court below err in adopting the doctrine of "ceremonial deism" in place of the *Lemon v. Kurtzman* analysis?

3. Did the court below correctly conclude that the Illinois Pledge Law is ambiguous, or did the court, contrary to this Court's precedents, rewrite an unambiguous statute and construe it as non-mandatory in order to save it?

4. Whether or not Illinois law provides for mandatory recital of the Pledge of Allegiance, is the Pledge Law unconstitutional under the principles enunciated in *Lee v. Weisman*?

LIST OF ALL PARTIES

ROBERT IAN SHERMAN (for himself and as natural guardian of Richard Harry Sherman)

RICHARD HARRY SHERMAN, a minor, Petitioners and Plaintiffs below.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP,
LLOYD DESCARPENTRIE (SCHOOL DISTRICT SUPERINTENDENT),
DR. FERNE GARRETT (PRINCIPAL OF RILEY SCHOOL),

Respondents and Defendants below.

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OPINIONS BELOW

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

714 F. Supp 932 (N.D. Ill. 1989):

(The District Court's denial of Defendant's motion to dismiss appears as Appendix D herein).

745 F. Supp 1371 (N.D. Ill. 1990):

(The District Court's ruling on Defendants' motion to dismiss the first amended complaint appears as Appendix C herein).

758 F. Supp 1244 (N.D. Ill. 1991):

(The District Court's grant of summary judgment for Defendants appears as Appendix B herein).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

980 F. 2d 437 (7th Cir. 1992):

(The opinion by the Seventh Circuit Court of Appeals affirming the District Court's grant of summary judgment for Defendants appears as Appendix A herein).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) on the grounds that the United States Court of Appeals for the Seventh Circuit has decided a federal question in a way that conflicts with applicable decisions of this Court, and that the case presents an important question of federal law which has not been, but should be, decided by this Court.

The final judgment of the United States Court of Appeals for the Seventh Circuit was entered November 20, 1992. This petition for certiorari is filed within 90 days of that date.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE LAW PROVISIONS

The "Illinois Pledge Law", 105 ILCS 5/27-3, provides, in pertinent part that:

> "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds."

STATEMENT OF THE CASE

In late 1988, Plaintiffs filed a two-count complaint in the United States District Court in Chicago, against certain Illinois school officials alleging violations of the First and Fourteenth Amendments. Specifically, Plaintiffs contended that the "Illinois Pledge Law", 105 ILCS 5/27-3, was unconstitutional on its face, as it appeared to *require* public elementary school students in Illinois to recite the Pledge of Allegiance, thereby violating the Free Exercise Clause. Plaintiffs also claimed that the teacher-led recital of the Pledge (which, since 1954, has contained the phrase, "One Nation under God") created a symbolic unity of government and religion in the presence of particularly impressionable youngsters, and therefore violated the Establishment Clause (and the Equal Protection Clause). The action was brought pursuant to 42 USC § 1983, and 28 U.S.C. §§ 1331 and 1343 (3) were asserted as jurisdictional bases.

In the District Court, Defendants filed a motion to dismiss which was denied. *Sherman v. Community Consolidated School District 21 of Wheeling Township*, (hereafter *Sherman*), 714 F. Supp. 932 (N.D. Ill 1989). The complaint was amended, however, and Defendants urged another motion to dismiss, which was similarly denied. *Sherman*, 745 F. Supp 1371 (1990). Defendants next made motions for summary judgments which were granted. *Sherman*, 758 F. Supp 1244 (1991). The District Court held that even though the Pledge statute used the words "shall be recited each school day", the use of the word "shall" was "unfortunate". 758 F. Supp at 1249. The Court went on to hold that the statute did not say "all" students shall say the Pledge. Therefore, the statute did not compel Plaintiff to say anything. In the absence of compulsion, the Court refused to find a Free Exercise Clause violation. With reference to Plaintiffs' Establishment Clause claim, the Court found that the Pledge Statute passed constitutional muster under the three part test of *Lemon vs. Kurtzman*, 403 U.S. 602 (1971). The Court also disposed of Plaintiffs' Equal Protection claim.

Plaintiffs appealed and the United States Court of Appeals for the Seventh Circuit rendered its opinion on November 20, 1992. The Court of Appeals affirmed the District Court's grant of summary judgment, finding that neither the Illinois Pledge Statute nor the practices of the Wheeling School District violated the Free Exercise or Establishment Clauses. More specifically, the Court held that the Pledge Statute was ambiguous and that the phrase "shall be recited each school day by pupils" should be read "shall be recited each school day by 'willing' pupils." *Sherman* 980 F.2d at 442-43. Therefore, the statute was not compulsory, and the Free Exercise Clause was not violated. The Court acknowledged the possibility that the rationale of *West Virginia State Board of Education vs. Barnette,* 319 U.S. 624 (1943), combined with the school prayer cases recognizing that recitation by a teacher or rabbi of unwelcome words *is* coercion, might make the Pledge unconstitutional in the setting of this case. *Sherman,* 980 F.2d at 444. But ultimately, the Court relied on school authorities' inherent power to prescribe the curriculum in finding no Free Exercise Clause violation.

In its decision regarding the Establishment Clause, the Court determined that it would not employ *Lemon vs. Kurtzman*, 403 U.S. 602 (1971), to this case, as "its status as a general purpose tool for administering the establishment Clause is in doubt", and *Lee vs. Weisman*, 505 U.S. ____, 120 L.Ed.2d 467 (1992), "concluded without renewing *Lemon's* lease". *Sherman,* 980 F. 2d at 445. Rather, the Court of Appeals applied the theory of "Ceremonial Deism" to analyze the question posed by this case. That is, the Court examined what it regarded as the original intent of the Framers concerning references to the Deity, and concluded that the Founding Fathers did not consider such references violations of the Establishment Clause. The Court also relied on Justice Brennan's formulation of the theory of "ceremonial deism" in such cases as *Abbington School District vs. Schempp*, 374 U.S. 203, 303-04 (1963); *Marsh vs. Chambers,* 463 U.S. 783, 818 (1983); (dissenting opinion); and *Lynch vs. Donnelly,* 465 U.S. 668, 716 (1984), (dissenting opinion), and *dicta* in

the opinions of various members of this Court approving the Pledge.

Finally, the Court of Appeals ruled that the Eleventh Amendment protected the Attorney General of Illinois from suit in this case. The Court affirmed the District court's judgment in all other respects.

Argument for Granting The Writ

1.
THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

In *Grand Rapids School District v. Ball*, 473 U.S. 373 (1985), this Court declared:

> "We have particularly relied on *Lemon* [vs. Kurtzman, 403 U.S. 602 (1971)] in every case involving the sensitive relationship between government and religion in the education of our children"

473 U.S. at 383.

Below, the Seventh Circuit not only refused to apply *Lemon*, it effectively announced *Lemon's* demise. Reviewing all of the opinions in *Lee v. Weisman*, 505 U.S. ____, 120 L.Ed.2d 467 (1992), this Court's most recent pronouncement on the Establishment Clause, the Court of Appeals was able to hold that "*Lee* concluded without renewing *Lemon's* lease". *Sherman vs. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437, 445 (7th Cir. 1992). Noting that the author of the majority opinion in *Lee* had previously disparaged *Lemon*, and that the four justices in dissent proposed jettisoning *Lemon* forthwith, the Seventh Circuit concluded that *Lemon's* "status as a general purpose tool for administering the establishment clause is in doubt" 980 F. 2d at 445. The Court of Appeals then compounded that doubt by treating *Lemon* as if it were no longer good law. Said the court: In light of the doubt surrounding *Lemon* . . . we are not disposed to resolve this case by parsing *Lemon*." 980 F.2d at 445.

It is, of course, axiomatic that until this Court overrules its own precedents they must be adhered to by lower courts. *Hutto v. Davis*, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this

Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."). Any fair reading of *Lee v. Weisman*, *supra*, reveals that it was not an overruling of *Lemon*. Indeed, the majority in *Lee* specifically declined the invitation by petitioners and the United States in that case to reconsider *Lemon*. 505 U.S. at ____, 120 L.Ed.2d at 480. The Seventh Circuit's premature burial of *Lemon* is thus error calling for correction by this Court through issuance of a writ of certiorari. The error is all the more egregious because this case involves particularly impressionable youngsters. (The minor Plaintiff in this case was in the first grade when this action commenced). As noted above, this Court has applied *Lemon* in every case involving the sensitive relationship between government and religion in education. *Grand Rapids*, *supra*, 473 U.S. at 383. The Seventh Circuit's failure to apply *Lemon* here represents a significant and dangerous departure from precedent, which justifies the issuance of a writ of certiorari.

2.

THE SEVENTH CIRCUIT ERRED BY REPLACING THE TRI-PARTITE ANALYSIS OF *LEMON V. KURTZMAN* WITH THE DOCTRINE OF CEREMONIAL DEISM

Just as problematic as the Court of Appeals' failure to apply *Lemon*, is the adequacy of the analytic framework the Court employed in its stead: "ceremonial deism". According to the Court of Appeals, under the doctrine of "ceremonial deism" a practice will pass constitutional muster if the Founders sanctioned its use. 980 F.2d at 445. In support of its conclusion that the Founders did not regard ceremonial invocations of God as "establishment", the Court cited the Declaration of Independence, the Gettysburg Address, and the tradition of presidential thanksgiving proclamations, all of which contain references to the Deity. But the perils and inconsistencies of this mode of constitutional analysis were limned by Justice Souter in *Lee*.

For instance, Justice Souter observed that although Presidents Washington and Adams "unapologetically marked days of

'public thanksgiving and prayer'" Thomas Jefferson (whose views were relied upon by the Seventh Circuit in support of its conclusion) steadfastly refused to do so during his presidency. 505 U.S. at ____, 120 L.Ed.2d at 505. And James Madison, perhaps the first among equals as a Founder, initially refused to issue such proclamations, then grudgingly did so, only to recant later in life, describing his issuance of the proclamations as "backsliding". 505 U.S. at ____, 120 L.Ed.2d at 505. Still more, Madison consistently maintained that public expenditures for military chaplains constituted "establishment" while that practice has been upheld by this Court and other courts. 505 U.S. at ____, 120 L.Ed.2d at 505. Ultimately, Justice Souter concluded that:

> " . . . these practices prove, at best, that the Framers simply did not share a common understanding of the Establishment Clause, and, at worst, that they, like other politicians, could raise constitutional ideals one day and turn their backs on them the next"

505 U.S. at ____, 120 L.Ed.2d at 505-06.

Clearly, the Founders lacked the uniformity of intent necessary to support the Seventh Circuit's new theory of Establishment Clause jurisprudence. Moreover, even it could be said that the Framers shared a uniform view of these matters, 18th Century practice should not foreclose further constitutional analysis. As Justice Souter observed:

> Ten years after proposing the First Amendment, Congress passed the Alien and Sedition Acts, measures patently unconstitutional by modern standards. If the early Congress's political actions were determinative, and not merely relevant, evidence of constitutional meaning, we would have to gut our current First Amendment doctrine to make room for political censorship.

505 U.S. at ____, 120 L.Ed.2d at 506.

Putting aside the flaws in the doctrine of "ceremonial deism" as propounded by the Seventh Circuit, and assuming that this Court were inclined to accept the theory as a permissible means of constitutional adjudication, still this Court should issue a writ of certiorari to review the decision below. That is because even if this Court is ready to permit "ceremonial deism" to become part of this Nation's Establishment Clause jurisprudence for the first time, it should not do so in *a case involving school children.*

If there is anything that has been consistent about this Court's Establishment Clause rulings it is the Court's commitment to heightened scrutiny in the elementary school context. To wit:

> "[This] Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted] . . . .
>
> The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [citations omitted] . . . .
>
> Furthermore, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools . . . ", *citing, McCollum v. Board of Education,* 333 U.S. 203, 231.

> Consequently, the court has been required often to invalidate statutes which advance religion in public elementary and secondary schools."

Edwards v. Aguillard, 482 U.S. 578, 584-85 (1987).

Thus, even if the doctrine of "ceremonial deism" could justify approval of the Pledge in adult settings, the elementary school context of this case raises different concerns. As the Court observed in *County of Allegheny vs. ACLU*, 492 U.S. 573, 620 Fn. 69:

> " . . . [t]his is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations. Cf. *Edwards v. Aguillard*, 482 U.S., at 583-584.(Establishment Clause must be applied with special sensitivity in the public school context)."

The minor Plaintiff in this case was in first grade at the outset of this litigation. Under Illinois law, the Pledge "shall be recited each school day." 105 ILCS 5/27-3. In the Pledge, God equals country ("one Nation under God"). There is no requirement in the statute that a teacher leading recital of the Pledge explain to his or her impressionable young charges that "God" in the Pledge does not really mean the "God" that is worshipped on Sundays or Sabbath or other days, but is, rather, the (nonreligious?) God referred to by the Founders. It is hard enough for adults to grasp this distinction, but to ask youngsters in first grade to perceive it borders on the absurd.

In any event, the Seventh Circuit gave absolutely no consideration to the special elementary school context of this case. Even if the Court of Appeals was correct in refusing to apply *Lemon* here, it should not have discarded more than thirty years of this Court's precedents manifesting an extraordinary solicitude for particularly impressionable school children. Accordingly, Petitioners urge this Court to issue a writ of certiorari to

review the decision of the Court of Appeals for the Seventh Circuit, which is premised on the dubious theory of "ceremonial deism", and which is in conflict with the tenor of most of this Court's Establishment Clause jurisprudence.

3.
THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT VIOLATED THIS COURT'S PRECEDENTS BY REWRITING AN UNAMBIGUOUS STATUTE IN ORDER TO SAVE IT

The Court of Appeals found that there was no coercion present in this case and therefore no Free Exercise Clause violation. In order to reach this conclusion the court was required to construe the language of the Illinois Pledge Statute, 105 ILCS 5/27-3. The portion of that statute at issue is the following sentence:

> "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds"

Petitioners contended below, and contend here, that this statute is singularly unambiguous and compulsory. As such, it would certainly be unconstitutional on its face under *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), as the Court of Appeals admitted. 980 F. 2d at 442. Petitioners based their argument on the fact that the statute uses the word "shall" and provides no hint of exception, melioration or accommodation in its language. Petitioners insisted below, and insist here, that if a sign says "cars shall turn left at the next intersection" that it does not mean that *some* cars *may* turn left at the next intersection, or that only *willing* cars shall turn left. Yet that is precisely the interpretation supplied by the Court of Appeals in this case.

The Seventh Circuit's justification for its reading of the statute is hardly cogent. It begins by describing the problem straightforwardly enough:

> " . . . what paragraphs 27-3 says is that the Pledge 'shall be recited each school day by pupils' in public schools."

980 F. 2d at 442.

The court then asks a series of questions:

> "Some pupils? Willing pupils? All pupils? It does not specify."

980 F. 2d at 442.

These questions ignore the fact that the statute does a good job of specifying exactly who is required to recite the Pledge: "pupils in public [elementary] schools". There is no more reason to ask which pupils are required to recite under the statute than there would be to ask which cars are required to turn under Petitioners' hypothetical.

The court acknowledged that if all pupils are required to recite the Pledge the statute would be unconstitutional under *Barnette*. 980 F. 2d at 442. It then observed that if the statute means "willing" pupils the constitutional barriers evaporate. 980 F. 2d 442.

Having asked questions suggesting that the statute was ambiguous, the court had no problem invoking the time-honored principle of law requiring the resolution of statutory ambiguities in favor of the interpretation that would save the statute. The court thus construed the statute to mean that only "willing" pupils need recite the Pledge.

No amount of ratiocination can mask the fact that the statute as written is plain and unambiguous. What it requires is recitation of the Pledge by *all* pupils in pubic elementary schools. Although the Court of Appeals disavowed an intent to "rewrite the statute in order to save it", that is precisely what it did. Its

construction of the statute was illogical, arbitrary and in conflict with this Court's precedents. Where the language of a statute is plain and its meaning unambiguous it is not susceptible to a limiting construction. *Houston v. Hill*, 482 U.S. 451, 468 (1987). The Seventh Circuit's *ipse dixit* assertion of ambiguity is insufficient to save the statute.

Assuming, however, that the Court of Appeals correctly decided the question whether the statute is mandatory *vel non*, the question remains whether, under other precedents of this Court, notably *Lee v. Weisman, supra,* the minor petitioner was subjected to other forms of compulsion sufficient to require reversal of the Appellate Court's opinion. It is to that question Petitioners now turn.

4.
THE SEVENTH CIRCUIT'S FAILURE TO CONSIDER THE SPECIAL ELEMENTARY SCHOOL CONTEXT OF THIS CASE PUTS ITS RULING IN CONFLICT WITH TWO DECADES OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

The question of federal law posed by this case is an important one left open in *Lee v. Weisman, supra,* and should be decided by this Court. What is the constitutionality of formulaic civic rituals which invoke the Deity, such as the Pledge of Allegiance? In *Barnette, supra,* this Court decided that no one can be forced to recite the Pledge. That much is clear. But there has been no (post-*Lemon*) case on any level of the federal judiciary (other than the case *sub judice*) testing the validity of the revised ("under God") version of the Pledge. This case squarely presents the question. Its answer has baffled no less an historic figure than Justice Brennan, who, in *Marsh v. Chambers,* 463 U.S. 783 (1983) opined that "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable court', 'In God We Trust' [and] 'One Nation Under God' . . . " 463 U.S. at 818, (dissenting opinion). Resolution of the issue by this Court would not only

provide an answer to an important question of federal law, but would also more generally help define the proper boundaries of the Establishment Clause.

The Court of Appeals found the Pledge constitutional over the objections of a dissenting youngster and in the schoolhouse setting. Petitioners submit that the Seventh Circuit's ruling conflicts with the principles of law enunciated in *Lee v. Weisman.*

In *Lee*, this Court began its analysis, as the court below should have, with an acknowledgement that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools [citations omitted]". 505 U.S. at ____, 120 L.Ed.2d at 484. The Court found that school control of the graduation ceremony places pubic pressure, as well as peer pressure, on the attending students to participate or maintain respectful silence. Id at 484. This pressure, the Court held, "though subtle and indirect can be as real as any overt compulsion" Id. at 484.

Significantly, the focus of the Court's opinion was on the "school-age children who objected". Id at 483. The Court determined that the social and peer pressure to participate in a state-led group exercise with religious overtones was constitutionally intolerable. It declared:

> "It is of little comfort to a dissenter [ ] to be told that for her the act of standing or remaining in silence signifies mere respect rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are

> mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.

505 U.S. at ____, 120 L.Ed.2d at 484-85.

These principles apply with equal force to the instant case. Here, a *first grader* was put to the terrible choice of resisting the considerable social and peer pressure to participate in a group exercise (standing with hand over heart and saying the Pledge) or "giving in" and reciting a slogan ("One Nation Under God") which is anathema to his "religious" beliefs. The choice is every bit as unacceptable in this case as it was in *Lee,* perhaps more so, in light of the very tender years of the minor Petitioner.

It should not matter that the group activity was denominated a "prayer" in *Lee* whereas here it is "only" the Pledge. A slogan repugnant to one's religious beliefs that one is forced to utter or be ostracized is no more palatable if buried in a patriotic exercise than it is in a formal prayer. Moreover, the Establishment Clause reaches beyond state sponsorship of "prayer". In *Grand Rapids School District v. Ball,* 473 U.S. 373, 389 (1985), this Court declared that:

> "Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement of disapproval of religion, a core purpose of the Establishment Clause is violated."

What is the Pledge but a grand declaration that this Nation, that the flag, that patriotism, are all inextricably intertwined with the belief in God? It is simply disingenuous to suggest that no one is harmed because, after all, it is "only" the benign and

patriotic Pledge of Allegiance. Nor can it seriously be asserted that first graders have the facility to perceive the subtle distinctions between "patriotic" endorsement of God, said to be permitted by the Founders, and outright (and unconstitutional) endorsement of God. Whatever merits "ceremonial deism" may have as a rationale for escaping the strictures of the Establishment Clause in an adult setting, surely the doctrine has no place in the schoolhouse, and especially not in the first grade.

Under the principles adhered to by this Court for over two decades, beginning with *Lemon v. Kurtzman, supra,* and culminating in *Lee v. Weisman,* the Pledge is clearly an unconstitutional symbolic union of God and State which conveys an unmistakable impression of government endorsement of religion over non-religion. Additionally, as explained by this court in *Lee,* the state-ordered group recital of the Pledge places the minor Petitioner here in the untenable position of succumbing to peer pressure or facing certain ostracism. The decision of the Seventh Circuit below fails to respect this court's precedents preventing such results, and should be reviewed by writ of *certiorari.*

CONCLUSION

Petitioners urge this Court to issue a writ of *certiorari* to the United States Court of Appeals for the Seventh Circuit to ensure lower court obedience to this Court's precedents, to protect *Lemon v. Kurtzman* and its progeny, and because this case presents an important federal question which has not been, but should be, decided by this Court.

Respectfully submitted,

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February 18, 1993

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 91-1684

ROBERT IAN SHERMAN, for himself and as natural guardian for RICHARD HARRY SHERMAN, a minor son,

Plaintiffs-Appellants,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9205—**Ann Claire Williams**, *Judge.*

ARGUED JANUARY 24, 1992—DECIDED NOVEMBER 20, 1992

Before CUMMINGS, EASTERBROOK, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). A state therefore may not compel any person to recite the Pledge of Allegiance to the flag. On similar grounds, *Wooley v. Maynard*, 430 U.S. 705 (1977), adds that a state may not compel any person to display its slogan. Does it follow that a pupil who objects

to the content of the Pledge may prevent teachers and other pupils from reciting it in his presence? We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate.

I

In 1979 Illinois enacted this statute: "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds." Ill. Rev. Stat. ch. 122 ¶27-3. We held in *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), that states may require teachers to lead the Pledge and otherwise communicate patriotic values to their students. The right of the school board to decide what the pupils are taught implies a corresponding right to require teachers to act accordingly. See also *Webster v. New Lenox School District*, 917 F.2d 1004 (7th Cir. 1990). Richard Sherman, who attends elementary school in Wheeling Township, Illinois, and his father Robert challenge the premise of *Palmer* that schools may employ a curriculum including the Pledge of Allegiance among its exercises. Since 1954 the Pledge has included the words "under God," 68 Stat. 249, which the Shermans contend violates the establishment and free exercise clauses of the first amendment. The full Pledge is: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 36 U.S.C. §172.

The district court's first opinion, 714 F. Supp. 932 (N.D. Ill. 1989), concluded that the Shermans have standing to challenge the recitation of the Pledge but expressed doubt that a third plaintiff—the Society of Separationists, Inc., a group of atheists of which Sherman *père* is president—is entitled to litigate. The court denied defendants' motion to dismiss but invited plaintiffs to amend their complaint.

Following the amendment, the court dismissed the Society as a party. 745 F. Supp. 1371 (1990). The Society has not appealed, so we do not mention it again. The new

complaint added the Attorney General of Illinois as a defendant. The Attorney General reiterated the contention that the Shermans lack standing; the court disagreed. The Attorney General also contended that the district court should abstain and that the challenge is unripe because Richard has not been penalized for his refusal to recite the Pledge. The court rejected both arguments. It did not address the Attorney General's submission that the eleventh amendment bars a suit against that office (the Shermans did not name the incumbent as a party in his personal capacity).

A third opinion, 758 F. Supp. 1244 (1991), granted the defendants' motions for summary judgment. The court held that the state's pledge law satisfies all three elements of the approach to the establishment clause in *Lemon v. Kurtzman*, 403 U.S. 602 (1971): it has a secular purpose, does not advance religion, and does not entangle the government in religion. Coerced readings of the Pledge would pose difficulties under the free speech and free exercise clauses, but the court concluded that the statute is not coercive as written or in application. Although ¶27-3 says that the Pledge "shall be recited each school day by pupils", it does not say by *all* pupils, and the absence of any penalty implies that the pupils are entitled to keep silent. Affidavits from the superintendent of schools, the principal of Richard's school, and Richard's first grade teacher all stated that no pupil was compelled to recite the Pledge, to stand during the Pledge or place his hand over his heart, or to leave if he would not join in, and that no one was penalized in any way for remaining silent and seated. Contrast *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978) (an obligation to stand at attention while other students recite the Pledge is forbidden compulsion); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (same). Any peer pressure to conform that Richard may have experienced, the court believed, does not justify silencing pupils who are willing to recite the Pledge.

II

Defendants renew their jurisdictional arguments. The Shermans disdained to address them, asserting that only defendants who file cross-appeals may contest the jurisdiction of the district court. The Shermans overlook the enduring principle that judges must consider jurisdiction as the first order of business, and that parties must help the courts do so. *Philbrook v. Glodgett*, 421 U.S. 707, 720-22 (1975); *Fusari v. Steinberg*, 419 U.S. 379, 387 n.12 (1975); *id.* at 390-91 (Burger, C.J., concurring). Nothing can justify adjudication of a suit in which the plaintiff lacks standing or there is some other obstacle to justiciability. Defendants fulfilled their duties to the court, while the lawyer representing the plaintiffs slighted his.

The eleventh amendment deprives federal courts of jurisdiction to consider most suits against states. State agencies or officials sued in their official capacity are "the state" for this purpose, *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989); *Kentucky v. Graham*, 473 U.S. 159 (1985), unless the plaintiff satisfies the requirements of *Ex parte Young*, 209 U.S. 123 (1908). See also *Hafer v. Melo*, 112 S. Ct. 358 (1991). Plaintiffs sued the Attorney General of Illinois in his official capacity only, seeking both damages and a declaratory judgment that ¶27-3 violates the Constitution. The eleventh amendment cleanly bars the award of damages in an official-capacity suit. Whether it also bars declaratory relief depends on the theory of liability. Plaintiffs have not articulated any theory under which *Ex parte Young* supports a suit against the Attorney General, who has never threatened the Shermans with prosecution and as far as we can tell has no authority to do so. (States' Attorneys, elected in each county, are the public prosecutors in Illinois. Paragraph 27-3 does not prescribe a penalty, so these officials also have nothing to do with the subject.) Plaintiffs apparently named the office of the Attorney General in an effort to obtain a judgment binding the State of Illinois as an entity, a step that Congress did not authorize when enacting 42 U.S.C. §1983 and that the eleventh amendment

does not permit in the absence of such authorization. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Attorney General must be dismissed as a party.

Defendants' other jurisdictional objections have less punch. Richard Sherman, obliged by the school-attendance laws to be present during the Pledge and the potential object of coercion to participate, has standing to challenge the statute. *Abington School District v. Schempp*, 374 U.S. 203, 224 n.9 (1963). His father has derivative standing as his guardian. The subject is ripe for adjudication. The Pledge law is on the books, being enforced at Richard's school by daily recitation. That school officials do not compel Richard to participate may bear on the merits but does not make the subject less appropriate for decision. Cf. *Lee v. Weisman*, 112 S. Ct. 2649 (1992) (adjudicating a challenge to a prayer at a high school graduation, with no Justice doubting justiciability).

Doctrines that counsel abstention do not imply that the court lacks subject-matter jurisdiction. The defendants' contention that the district court should have abstained while awaiting clarification of the meaning of the state's law, if accepted, would require us to alter its judgment. To obtain such an alteration, the defendants needed to file appeals of their own. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 560 n.11 (1976). See Robert L. Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?*, 87 Harv. L. Rev. 763 (1974).

Now that the case has reached our court, certification to the Supreme Court of Illinois would be the best way to find out whether the state's law requires each pupil to recite the Pledge of Allegiance. *Houston v. Hill*, 482 U.S. 451, 470-71 (1987). None of the parties has asked us to seek the views of the Supreme Court of Illinois. We could do so on our own, but the reason the district judge gave for not abstaining is an equally cogent reason for our not certifying: "Plaintiffs maintain that having the Pledge led by the principal daily is inherently coercive and therefore violative of plaintiffs' rights. Thus, even if

an Illinois court interprets the statute to exempt children who cannot say the Pledge for religious or political reasons, the court would still have to resolve the question of whether school officials' leading of the Pledge, pursuant to the statute, results in unconstitutional coercion." 745 F. Supp. at 1374. Circuit Rule 52 permits us to certify a question of state law only when the answer "will control the outcome" of the case. See also Rule 20 of the Rules of the Supreme Court of Illinois (certification authorized when the answer "may be determinative of the said cause").

Although we could *make* the state court's answer controlling by first deciding all of the Shermans' constitutional arguments, leaving only the meaning of state law unresolved, such a course invites advisory adjudication. Thus the best course is to interpret the state law for ourselves. We cannot rewrite a law in order to "save" it, *Houston*, 482 U.S. at 468-69; *K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992); *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 332-34 (7th Cir. 1985), affirmed without opinion, 475 U.S. 1001 (1986), but federal courts interpret state statutes in constitutional cases no less than in cases under the diversity jurisdiction. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2822 (1992); *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). No interpretation we announce will bind Illinois or other school districts, see *Kucharek v. Hanaway*, 902 F.2d 513, 517 (7th Cir. 1990), but it will control how Wheeling Township must treat Richard, which is all the Shermans are entitled to.

III

If Illinois requires every pupil to recite the Pledge, then *Barnette* scuttles the statute, and we need not consider whether "under God" distinguishes the Pledge from other patriotic exercises. Plaintiffs contend that the language of ¶27-3—"The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions

supported or maintained in whole or in part by public funds."—is unambiguous and compulsory.

Defendants persuaded the district court that the lack of a penalty for silence eliminates any compulsion, or at least shows that the state legislature did not mean to require children to recite the Pledge. True, there was a penalty (expulsion from school) in *Barnette*. Yet other cases dealing with readings, prayers, or periods of silence in the classroom thought the absence of a formal penalty irrelevant. E.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Lee v. Weisman*, 112 S. Ct. 2649 (1992). Oliver Wendell Holmes looked to penalties in order to see how the law affected those who regard their own welfare exclusively. *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897), reprinted in *Collected Legal Papers* 167, 173 (1920). Many people obey laws just because they represent the will of the majority expressed through democratic forms. See *Kurowski v. Krajewski*, 848 F.2d 767, 774-75 (7th Cir. 1988). They revere law for the sake of civility, harmony, and consideration of others—values that schools try to inculcate. More: penalties may be real (the displeasure of one's teacher can be formidable) even though not administered by judges. How ironic if Richard Sherman's first experience with law were to teach him that the legal sanction expresses the full meaning of a rule. Then the lesson of the Pledge of Allegiance would be cynicism rather than patriotism. Looking at the law through the lens of penalties is useful for many purposes, but not when the task is to teach civic virtue.

What the law requires of principals, teachers, and pupils depends on the language it contains rather than the penalty it omits. And what ¶27-3 says is that the Pledge "shall be recited each school day by pupils" in public schools. Some pupils? Willing pupils? All pupils? It does not specify. If it means "all pupils" then it is blatantly unconstitutional; if it means "willing pupils" then the most severe constitutional problem dissolves. When resolving statutory

ambiguities, the Supreme Court of Illinois adopts readings that save rather than destroy state laws. E.g., *Country Mutual Insurance Co. v. Knight*, 40 Ill. 2d 423, 240 N.E.2d 612 (1968). Given *Barnette*, which long predated enactment of this statute, it makes far more sense to interpolate "by willing pupils" than "by all pupils." School administrators and teachers satisfy the "shall" requirement by leading the Pledge and ensuring that at least some pupils recite. Leading the Pledge is not optional, see *Palmer*, but participating is. This makes sense of the statute without imputing a flagrantly unconstitutional act to the State of Illinois.

This understanding is consistent with the practice in the Wheeling schools. The superintendent of schools, the principal of Riley School (which Richard attends), and his first grade teacher when this suit began, all filed affidavits stating that neither Richard nor any other pupil is compelled to recite the Pledge, to place his hand over his heart, to stand, or to leave the room while others recite. Marilyn Barden, Richard's teacher, averred that she brooks no hazing of those who decline to participate, and that she has never noticed any. The only contrary suggestion comes from Robert Sherman's affidavit, which states: "Defendant Garrett, principal of the school attended by my son, asks my son to stand with one hand over his heart and participate with the other pupils in reciting the pledge." But as this affidavit does not reflect personal knowledge—Robert Sherman does not say that he has ever been in Richard's class during the recitation or that he has heard principal Garrett make such a demand—the district court properly disregarded it. Robert does not even aver that his son told him this, and Richard did not file an affidavit of his own. Affidavits offered in opposition to motions for summary judgment "shall be made on personal knowledge [and] shall set forth such facts as would be admissible in evidence". Fed. R. Civ. P. 56(e). The same defect prevents giving force to Robert Sherman's assertion that Richard was hassled by other children on the playground because of his refusal to recite the Pledge. Children can be exceedingly cruel to one another, but the rancor (not in any

event attributable to the State of Illinois) must be established by admissible evidence.

We have not overlooked some juicy tidbits of legislative history that plaintiffs proffer. Senator Netsch spoke against the adoption of ¶27-3, expressing a belief that the bill could not coexist with *Barnette*. Senator Knuppel replied: "it amazes me that these people get up and read that kind of garbage that Jackson [Justice Robert Jackson, author of the majority opinion in *Barnette*] had there, his advise [sic] from the Supreme Court, I rate just about as highly as I do the advise [sic] from Congress." Senate Debates, 81st Illinois General Assembly, May 22, 1979, at 272. Senator Lemke then called for the election of federal judges and added: "Maybe we ought to abolish the Supreme Court and have a dictatorship like in Russia because in Russia at least they say a pledge of allegiance to their own flag." *Ibid.* It is hard to believe that an elected official of Illinois prefers totalitarian government to democracy under law just because dictatorships employ more patriotic slogans, which dictators may deem necessary to their success. That two state senators are able to bring obloquy upon themselves does not help us know whether ¶27-3 means "all pupils" rather than "willing pupils". Senator Nimrod, the bill's sponsor, treated the recitation as noncompulsory. *Id.* at 270-71. Statements on the floor of the state's lower chamber may be read either way. These unenlightening exchanges do not show that Illinois enacted a law that would be stillborn under *Barnette*.

Notwithstanding the lack of penalties or efforts by teachers to induce pupils to recite, there remains social pressure to do so and a sense of exclusion when one's beliefs enforce silence during a ceremony others welcome. When discussing the Pledge of Allegiance, four Justices remarked: "[I]t borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full membe[r] of the political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." *Allegheny County v. Pittsburgh ACLU*, 492 U.S. 573, 673 (1989)

(Kennedy, J., joined by Rehnquist, C.J., and White & Scalia, JJ.). Concerns of this kind, among others, led Justice Kennedy (this time speaking for a majority in *Lee v. Weisman*) to treat prayer during a high school graduation as a form of compulsion, even though the student may remain silent without overt penalty. *Engel v. Vitale*, 370 U.S. at 430-31, the first of the school-prayer cases, expressed a similar conclusion. We have postponed to Part IV discussion the effect of "under God". But perhaps the rationale of *Barnette*, when joined with the school-prayer cases, equates social pressure with legal pressure. If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

As an analogy this is sound. As an understanding of the first amendment it is defective—which was Justice Kennedy's point in *Allegheny*. The religion clauses of the first amendment do not establish general rules about speech or schools; they call for religion to be treated differently. Recall that for now we are treating the Pledge as a patriotic expression, even though the objections to public patriotism may be religious (as they were in *Barnette*). Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.

Consider what a general assimilation of religion to patriotism and other values would mean for the public schools. The majority in *Lee* remarked, 112 S. Ct. at 2657: "By the time they are seniors, high school students no doubt

have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these." They are required to read books promoting ideas they find wicked. Sometimes their creed may teach that reading such material is itself sinful. Canon law in the Roman Catholic Church, and equivalent rules of other religions, restricts the reading of books that misrepresent or undermine the faith. See Redmond A. Burke, *What is the Index?* (1952). (The Catholic Church suspended publication of the *Index Librorum Prohibitorum* in 1966 but did not abolish the distinction between moral and immoral literature.) Cases arising out of religious beliefs that particular books should not be read include *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1061-62 (6th Cir. 1987), and *Smith v. Mobile Board of School Commissioners*, 827 F.2d 684 (11th Cir. 1987). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Students not only read books that question or conflict with their tenets but also write essays about them and take tests—questions for which their teachers prescribe right answers, which the students must give if they are to receive their degrees. The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons. The problem extends past government and literature to the domain of science; the religious debate about heliocentric astronomy is over, but religious debates about geology and evolution continue. An extension of the school-prayer cases could not stop with the Pledge of Allegiance. It would extend to the books, essays, tests, and discussions in every classroom.

A pupil who takes exception to the prescribed curriculum of the public schools—whether the textbooks or the class discussions or the civic ceremonies such as the Pledge of Allegiance—is asserting a right to accommodation of his political or religious beliefs. Humane government often calls for accommodation; programs such as tuition vouchers serve this interest without offending other constitutional norms. *Witters v. Washington Department of Ser-*

vices for the Blind, 474 U.S. 481 (1986). See also Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 Harv. L. Rev. 989 (1991). But see *Zobrest v. Catalina Foothills School District*, 963 F.2d 1190 (9th Cir. 1992), cert. granted, No. 92-94 (Oct. 5, 1992). Government nonetheless retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and select private education at their own expense. The private market supports a profusion of schools, many tailored to religious or cultural minorities, making the majoritarian curriculum of the public schools less oppressive. We agree with Judge Boggs that "school boards may set curricula bounded only by the Establishment Clause" even though pupils may find the books and classroom discourse offensive or immoral. *Mozert*, 827 F.2d at 1080 (concurring opinion). By remaining neutral on religious issues, the state satisfies its duties under the free exercise clause. *Employment Division v. Smith*, 494 U.S. 872 (1990). All that remains is *Barnette* itself, and so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag "and to the Republic for which it stands".

IV

All of this supposes that the Pledge is a secular rather than sectarian vow. Everything would be different if it were a prayer or other sign of religious devotion. Does "under God" make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?

The district court trudged through the three elements identified by the Court in *Lemon*, concluding that the Pledge passes every test. Of course *Lemon* was not devised to identify prayer smuggled into civic exercises, and its status as a general-purpose tool for administering the

establishment clause is in doubt. Rumblings of discontent are frequent. The Court heard *Lee v. Weisman* in large part to reconsider *Lemon*, and *Lee* concluded without renewing *Lemon*'s lease. The majority opinion reserved decision on the future of *Lemon*. 112 S. Ct. at 2655. Three members of the majority signed an opinion employing *Lemon*, 112 S. Ct. at 2663-64 (Blackmun, J., joined by Stevens & O'Connor, JJ.), but one member of this group has expressed doubts. *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting). The author of the majority opinion in *Lee* has disparaged *Lemon*, see *Allegheny*, 492 U.S. at 655-56 (opinion of Kennedy, J.). The fifth member of the majority in *Lee* wrote a concurring opinion that did not rely on or endorse *Lemon*. 112 S. Ct. at 2667-78 (Souter, J.). And four Justices proposed to jettison *Lemon* forthwith. 112 S. Ct. at 2685 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.). So we are not disposed to resolve this case by parsing *Lemon*.

Our approach is more direct. Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods? You can't understand a phrase such as "Congress shall make no law respecting an establishment of religion" by syllogistic reasoning. Words take their meaning from social as well as textual contexts, which is why "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). Unless we are to treat the founders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as "establishment." They did not. See *Allegheny*, 492 U.S. at 671-73 (opinion of Kennedy, J.).

James Madison, the author of the first amendment, issued presidential proclamations of religious fasting and

thanksgiving.[1] Thomas Jefferson, who refused on separationist grounds to issue thanksgiving proclamations,[2] nonetheless signed treaties sending ministers to the Indians.[3] The tradition of thanksgiving proclamations began with President Washington, who presided over the constitutional convention.[4] From the outset, witnesses in our courts have taken oaths on the Bible, and sessions of court have opened with the cry "God save the United States and this honorable Court." Jefferson's Declaration of Independence contains multiple references to God (for example: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."). When Madison

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[1] See Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* 100 (1986). In 1817, after leaving office, Madison confessed that these proclamations violated the principles of separation for which he stood but pleaded "the legal aphorism de minimis non curat lex." Elizabeth Fleet (ed.), Madison's "Detached Memoranda", 3 William & Mary Quarterly 534, 559 (1946), reprinted in Philip B. Kurland & Ralph Lerner (eds.), 5 *The Founders' Constitution* 104 (1987).

[2] See his letter to Rev. Samuel Miller, in 5 *The Founders' Constitution* 98-99.

[3] The treaties are collected in Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-70 (1982).

[4] E.g., the Proclamation of October 3, 1789, which begins: "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor" and then sets Thursday, November 26, 1789, as a day "to be devoted . . . to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care", and much more in the same vein. 5 *The Founders' Constitution* 94. Washington issued this proclamation on the joint recommendation of both Houses of Congress, *ibid.*, which only days before (on September 25) had sent the text of the establishment clause to the states for ratification.

and Jefferson wrote their famous declarations supporting separation of church and state, they invoked the name of the Almighty in support.[5]

The Founders' tradition has endured. Presidents still issue proclamations of thanksgiving. Details such as the Pledge of Allegiance and the motto on the coinage testify to its force. The Pledge tracks Lincoln's Gettysburg Address, which ends with a wish "that this nation, under God, shall have a new birth of freedom and that government of the people, by the people, for the people, shall not perish from the earth." The second inaugural address of that great statesman and poet concludes: "With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation's wounds; to care for him who shall have borne the battle, and for his widow, and his orphan—to do all which may achieve and cherish a just and lasting peace among ourselves, and with all nations." Pupils who study this address with care will find 14 references to God among its 699 words.

When it decided *Engel v. Vitale*, the first of the school-prayer cases, the Court recognized this tradition and distinguished ceremonial references to God from supplications for divine assistance: "There is of course nothing in the decision reached here that is inconsistent with the fact

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[5] Here is the preamble to Virginia's Act for Establishing Religious Freedom, which Jefferson drafted in 1779 (and the state enacted in 1785): "Well aware that the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds, that Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain, by making it altogether insusceptible of restraint: That all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do, but to extend it by its influence on reason alone". 5 *The Founders' Constitution* 77.

that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." 370 U.S. at 435 n.21. To the same effect see *Schempp*, 374 U.S. at 306-08 (Goldberg, J., joined by Harlan, J., concurring). *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984), includes the Pledge in a list of civic exercises with religious connotations, which the Court implied are permissible. See also *id.* at 693 (O'Connor, J., concurring), expressing the view that Thanksgiving, "In God We Trust" and similar "government acknowledgments of religion serve . . . the legitimate secular purposes of solemnizing public occasions . . . and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, [these] practices are not understood as conveying approval of particular religious beliefs."

Justice Brennan, among the most stalwart of separationists, expressed similar thoughts when concurring in *Schempp*, 374 U.S. at 303-04:

> [W]e have simply interwoven the motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than

> the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

By the time of *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (dissenting opinion), Justice Brennan was equivocal: "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like. I might well adhere to the view expressed in *Schempp* that such mottoes are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance." In *Lynch*, 465 U.S. at 716 (dissenting opinion), Justice Brennan concluded that "the reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content." (Footnote omitted.) This court adopted such an approach when observing in *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), that both "In God We Trust" and Christmas trees are secular, having lost their original religious significance. See also *Allegheny*, 492 U.S. at 616 (opinion of Blackmun, J.).

An outcry in dissent that one or another holding logically jeopardizes the survival of this tradition always provokes assurance that the majority opinion carries no such portent. *Engel* was the first of these, and *Allegheny*, 492 U.S. at 602-03, the most recent: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief. . . . We need not return to the subject of 'ceremonial deism,' . . . because there is an obvious distinction between crèche displays and references to God in the motto and the pledge." Plaintiffs observe that the Court sometimes changes its tune when it confronts a subject directly. True enough, but an inferior court had best respect what the majority says rather than read between

the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.

The judgment of the district court with respect to the Attorney General of Illinois is vacated, and that portion of the case is remanded with instructions to dismiss for want of jurisdiction. In all other respects the judgment is affirmed.

MANION, *Circuit Judge, concurring.* I concur with the court's fine opinion and conclusion that reciting the Pledge of Allegiance does not offend the establishment clause. I write separately to emphasize that we need not totally denude the Pledge by reducing its language to the lowest common denominator of "ceremonial deism" as favored by Justice Brennan. A civic reference to God does not become permissible under the First Amendment only when it has been repeated so often that it is sapped of religious significance. Such an approach implies that phrases like "in God we trust" or "under God", when initially used on American coinage or in the Pledge of Allegiance, violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use. As this court shows, the Founders demonstrate by their behavior that the First Amendment was not intended to prohibit states from sanctioning ceremonial invocations of God. Such state action simply does not amount to an establishment of religion.

Another problem with the concept of "ceremonial deism" is that it selects only religious phrases as losing their significance through rote repetition. Why only "under God"? Why not "indivisible", "liberty and justice for all"? Do not these equally repeated phrases also lose their meaning under the logic of "ceremonial deism"? The answer, quite simply, is that a court cannot deem any words

to lose their meaning over the passage of time. Each term used in public ceremony has the meaning intended by the term.

There is a significant difference in a result which strikes down the Pledge as an endorsement of religion, and one which leaves the Pledge intact, accompanied by the official pronouncement that it is meaningless. While under the first alternative the Pledge is prohibited from civic functions, under the second alternative the Pledge is allowed, and people are free to ignore the pronouncement of this court, and recite the Pledge with any degree of meaning they desire.

There is no need, however, to apply either alternative. The Pledge of Allegiance with all of its intended meaning does not effectuate an establishment of religion. If legislative prayer based upon the Judeo-Christian tradition is permissible under *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330 (1983), and a Christmas nativity scene erected by a city government is permissible under *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355 (1984), then certainly the less specific reference to God in the Pledge of Allegiance cannot amount to an establishment of religion. We need not drain the meaning from the reference to reach this conclusion.

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APPENDIX B

IN THE

United States District Court for the Northern District of Illinois Eastern Division

ROBERT IAN SHERMAN, for himself and as natural guardian for RICHARD HARRY SHERMAN, a minor son,

Plaintiffs,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, LLOYD DESCARPENTRIE, School District Superintendent, and DR. FERNE GARRETT, Principal of Riley School, individually and as representatives of the STATE OF ILLINOIS, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Defendants.

Case No. 88 C 9205

MEMORANDUM OPINION AND ORDER

Plaintiffs Robert Sherman and his minor son Richard Sherman are atheists and they allege that the Illinois statute which provides for the daily recitation of the Pledge of Allegiance in public elementary schools[1] violates their rights under the First and Fourteenth Amendments to the Constitution. Mr. Sherman

[1] Ill. Rev. Stat. ch. 122, 27-3 provides, in part, "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds."

filed a two-count complaint against the school district in which his son's school is located, the school district superintendent, the principal of his son's school, and the Illinois Attorney General seeking to have the statute declared unconstitutional and requesting monetary damages from the defendants.[2] Mr. Sherman and defendant Attorney General Hartigan filed cross-motions for summary judgment regarding Counts I and II. Defendants School District 21, Superintendent Descarpentrie and Principal Garrett ("the school defendants") filed a motion to dismiss Count I and a motion for summary judgment on Count II. For the following reasons, the court denies the school defendants' motion to dismiss Count I, denies plaintiffs' motion for summary judgment on Counts I and II and grants defendant Hartigan's motion for summary judgment on Counts I and II. The granting of defendant Hartigan's motion for summary judgment renders moot the school defendants' motion for summary judgment on Count II.

Motion to Dismiss Count I

In Count I of the second amended complaint, plaintiffs seek a declaratory judgment that the Illinois pledge law is unconstitutional because it violates the Establishment Clause and the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In Count I plaintiffs also seek a permanent injunction against all defendants to "restrain[ ] defendants from compelling adherence to" the Illinois pledge law. Re-Amended Complaint, Count I, prayer for Relief, Para. 2. Defendants School District 21, Superintendent Lloyd Descarpentrie and Principal Ferne Garrett maintain that

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[2] The defendants previously filed motions to dismiss and the court denied the motions. *See Sherman, et al. v. Community Consolidated School District 21 of Wheeling Township, et al.*, 714 F. Supp. 932 (N.D. Ill. 1989) (denying motion to dismiss of defendants School District 21, Descarpentrie and Garrett) and *Sherman, et al. v. Community Consolidated School District 21 of Wheeling Township, et al.*, 745 F. Supp. 1371 (N.D. Ill. 1990) (denying defendant Hartigan's motion to dismiss).

Count I should be dismissed against all the defendants except defendant Hartigan because defendant Hartigan is the only defendant with the authority to enforce the statute. *See* Motion to Dismiss Count I at 2. *See also, Koehler v. Ogilvie,* 53 F.R.D. 98, 102 (N.D. Ill. 1971) ("officers of a state who are clothed with some duty in regard to the enforcement of the laws of the state . . . may be enjoined by a federal court" from enforcing an unconstitutional statute), *aff'd*, 405 U.S. 906 (1971).

While the defendants are correct that the Attorney General or the State's Attorney are normally the officials charged with enforcing statutes, Mr. Sherman alleges in the complaint that defendants Garrett and Descarpentrie, on behalf of School District 21, enforce the pledge statute in his son's school. For example, Mr. Sherman alleges that Principal Garrett asks his son to participate in the daily pledge, that none of the defendants advise his son of his right not to participate, and that defendants Descarpentrie and Garrett have supervisory responsibilities and policymaking powers in the district and in his son's school. *See* Re-Amended Complaint, Paragraphs 8, 11 and 23. On a motion to dismiss, the court is obligated to take the allegations in the complaint as true. Therefore, the court finds that based on plaintiffs' allegations that all defendants enforce the statute in issue, all defendants are properly named in Count I. The court denies the motion of School District 21 and defendants Descarpentrie and Garrett to dismiss Count I against them.

Motions for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that a motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Plaintiffs and defendant Hartigan, by filing cross-motions for summary judgment, represent that there are no genuine issues of material fact for trial and that the issue of whether the Illinois pledge statute is

constitutional can be decided by the court as a matter of law. As noted above, plaintiffs allege that the statute is unconstitutional because it violates the Establishment Clause and the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The court will address each of these contentions in turn.

Establishment Clause

In its first opinion in this case, the court discussed the viability of plaintiffs' claim that the Illinois pledge statute violates the Establishment Clause of the First Amendment to the Constitution. *See Sherman,* 714 F. Supp. at 934-36. The court noted that a case from another circuit specifically held that the recital of the pledge of allegiance in a public school does not violate the Establishment Clause. *See Smith v. Denny,* 280 F. Supp. 651 (E. D. Ca. 1968), *appeal dismissed,* 417 F.2d 614 (9th Cir. 1969). The court also cited cases holding that neither the singing of the national anthem in public school nor the use of the motto "In God We Trust" on coins violates the Establishment Clause. *See Sheldon v. Fannin,* 221 F. Supp. 766 (D. Ariz. 1963); *Aronow v. United States,* 432 F.2d 242 (9th Cir. 1970); *Hall vs. Bradshaw,* 630 F.2d 1018 (4th Cir. 1980) (in dicta the court stated that "[r]eferences to the Deity in our ceremonies and on our coinage and seals do not violate the Establishment Clause because they merely reflect this fact of our history and no longer have any potentially entangling theological significance"), *cert. denied,* 450 U.S. 965 (1981). Finally, the court stated that although the U.S. Supreme Court has not expressly ruled on whether a pledge statute like the one adopted in Illinois violates the Establishment Clause, "[t]he Court has expressed its implicit approval of the Pledge . . . " *Sherman*, 714 F. Supp. at 936. Based on this review of the case law, the court stated that "the failure of the plaintiffs' Establishment Clause claim is all but a foregone conclusion." *Id.* at 935.

However, the court did not dismiss plaintiffs' Establishment Clause claim pursuant to Fed. R. Civ. p. 12(b)(6) because to do

so, the court would have had to examine documents outside the pleadings, and that is forbidden in the context of a motion to dismiss. Now that the court has been presented with motions for summary judgment, the court may look at documents outside the pleadings and perform the necessary analysis to decide whether the Illinois pledge statute violates the Establishment Clause of the First Amendment. In performing this analysis, the court will use the test developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for determining whether a statute comports with the Establishment Clause. The three elements of the test are as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion' [citations omitted].

Id. at 612-13.

The court finds that there are no genuine issues of material fact as to whether the Illinois pledge law passes all three prongs of the *Lemon* test. First, the legislature adopted the law for the secular purpose of instilling patriotic values in elementary school students. Plaintiffs point to the comments of one legislator to try to show that the pledge law had a religious purpose. Senator Mitchler stated,

> You should teach your children to pray and you should teach your children to respect your Country. For God and country, because that's the basis on which this nation was founded. I think this is a training period in grades one through six and I'd even be having some sort of a prayer in the schools and . . . and I don't think that that's being overburdensome or anything because I think it's teaching them patriotism and I don't see anything wrong with that . . . to be able to stand up and recite the Pledge and have a prayer . . .

Plaintiffs' Memo. in Support of Motion for Summary Judgment at 6. However, Senator Mitchler was the only legislator who tried to link the pledge and prayer. Moreover, his comments about prayer in school are not relevant to the purposes of the pledge statute because the statute does not provide for prayer in school. At most, these comments show that if given the chance, it seems this Senator would vote for an unconstitutional law authorizing prayer in the public schools.

In contrast to Senator Mitchler's comments, the sponsors of the pledge law, Senator Nimrod and Representative Pullen, stated several times that the purpose of the law was to instill patriotic concern and knowledge of American ideals in elementary school students. *See e.g.*, Ill. Gen. Assembly, Senate Floor Debates, May 22, 1979, pp. 273, 275; June 28, 1979, p. 92; House Floor Debates, June 25, 1979, p. 65.[3] The secular, patriotic purpose of the law is clear when one examines the statute as a whole. The statute not only requires the pledge to be recited daily, but also requires that students be taught and tested on the principles enunciated in the American Declaration of Independence, the U.S. Constitution and the Constitution of the State of Illinois. The statute also provides that students must learn about the proper use and display of the American flag, and voting methods. In sum, the text of the statute and its legislative history reveal that the purpose of the pledge law is to teach secular, patriotic values and not religious values.

The statute also passes the second prong of the *Lemon* test because the primary effect of the statute neither advances nor

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[3] The court notes that there was much heated debate in the legislature over whether the statute as written would be violative of the Free Exercise Clause of the First Amendment because it could be interpreted to mandate the recital of the pledge. The court will discuss this issue when it addresses plaintiff's Free Exercise claim. However, the issue of compulsion is not relevant when deciding whether a statute has a secular purpose in compliance with the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962) ("The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether these laws operate directly to coerce non-observing individuals or not.").

inhibits religion. As noted above, the primary effect of the statute is to teach students about the principles under which our government operates and not to advance any particular religious beliefs. The recital of the pledge, like the singing of the National Anthem, "is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation." *Sheldon*, 221 F. Supp. at 774.

Finally, the statute passes the third part of the *Lemon* test because it does not cause excessive entanglement of government with religion. The statute at issue in this case is a far cry from the statute which the *Lemon* Court held would create an excessive entanglement between church and state. In *Lemon*, the Court examined two state statutes which authorized using public funds to subsidize teachers who taught secular subjects in non-public schools. The Court found that the statutes would cause excessive entanglement with religion because the majority of the non-public schools which would receive the funds were parochial schools. Therefore, the state governments would have to constantly monitor the programs to insure that public funds were not being used for any religious purposes. In this case, the statute requires the teaching of secular subjects in public, non-parochial schools, so no entanglement with religion is involved. Based on this analysis, the court finds as a matter of law that the Illinois statute does not violate the Establishment Clause of the First Amendment.

Free Exercise

Although the court held in its previous opinion that "the failure of plaintiffs' Establishment Clause claim [was] all but a foregone conclusion," the court went on to find that plaintiffs had "stated a claim for violation of the Free Exercise Clause." *Sherman*, 714 F. Supp. at 935, 937. The court found that the allegations in plaintiffs' complaint that Richard Sherman was

told to recite the pledge daily by his principal, that he was embarrassed and faced sanctions when he refused, and that the language of the statute was mandatory were sufficient to state a claim that Richard Sherman was unconstitutionally coerced to recite the pledge. *Id.* at 935. It should be noted that the court gave plaintiffs' complaint the "solicitude accorded to *pro se* pleadings" because plaintiffs drafted and filed their complaint before they obtained counsel. *Id.* at 933 n.1. Moreover, the court did not consider any other documents, such as the school defendants' affidavits stating that Richard was free to remain seated during the pledge, because a court cannot consider documents outside the pleadings on a motion to dismiss. In its second opinion in this cause, in which the court considered defendant Hartigan's motion to dismiss, the court reiterated its holding that plaintiffs' complaint was sufficient to state a claim under the Free Exercise Clause. However, the court warned that "when the court considers the parties' summary judgment motions, vague allegations of coercion, unsupported by competent affidavits, will not be sufficient to create a genuine issue of material fact." *Sherman*, 745 F. Supp. at 1374, n.4.[4] The court will now determine whether there is a genuine issue of fact regarding plaintiffs' Free Exercise claim.

The parties agree that when school officials force public school students to recite or participate in the Pledge of Allegiance, it violates the students' rights under the Free Exercise Clause of the First Amendment. The Supreme Court so held in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), and many lower courts have reaffirmed this principle

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[4] After denying defendant Hartigan's motion to dismiss, the court set a briefing schedule for defendant Hartigan's motion for summary judgment. Thus, plaintiffs, having been warned about the importance of sufficient affidavits, could have submitted supplementary affidavits in response to defendant Hartigan's motion for summary judgment. However, plaintiffs chose not to file any response to defendant Hartigan's motion and instead relied on the briefs and affidavits previously filed in support of plaintiffs' motion for summary judgment and in opposition to the school defendants' motions.

since *Barnette* was decided. *See, e.g., Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1066 (6th Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988); *Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981); *Lipp v. Morris*, 579 F.2d 834, 835-36 (3d Cir. 1978); *Goetz v. Ansell*, 477 F.2d 636, 637-39 (2d Cir. 1973); *Frain v. Baron*, 307 F. Supp. 27, 31-34 (E.D.N.Y. 1969). However, the parties disagree about whether the Illinois pledge law, and the School defendants' implementation of the law violate the principles enunciated in these cases.

Plaintiffs maintain that the court should hold Ill. Rev. Stat. ch. 122, Para. 27-3 facially unconstitutional because the use of the word "shall" makes the statute coercive, regardless of whether the school defendants are applying the statute in a mandatory way. The court agrees that it was an unfortunate choice to use the word "shall" in the statute without explicitly creating an exception for conscientious objectors, however the use of the word "shall" alone does not necessitate declaring the statute to be facially unconstitutional. The statute does not state that "all" students shall say the pledge, and therefore an exception can be implied for conscientious objectors. Moreover, the statute contains no penalty on its face. In fact, the sponsors of the law relied on the lack of a penalty when arguing that the law did not violate the principles enunciated in *Barnette, supra. See* Ill. Gen. Assembly, Senate Floor Debates, May 22, 1979, pp. 270-71; House Floor Debates, June 25, 1979, pp. 61, 64; June 30, 1979, pp. 60-61. Finally, the court does not find the statute facially unconstitutional because "plaintiffs must generally show that a statute is unconstitutional as applied, not merely that it may be interpreted to authorize unconstitutional actions." *Van Zandt v. Thompson*, 839 F.2d 1215, 1218 (7th Cir. 1988), *citing*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-04 (1985). The court will now examine whether the statute is unconstitutional "as applied."

Defendant Hartigan states in his motion for summary judgment that "plaintiff Richard Sherman has never been in any way

required, forced, or compelled to 'stand during, recite or otherwise participate in the Pledge of Allegiance' by his teacher or any employee of Community Consolidated School District 21 of Wheeling Township." Hartigan's Memo. in Support of Motion for Summary Judgment at 4. As evidence of this, defendant Hartigan cites to the affidavits of Superintendent Descarpentrie, Principal Garrett and Richard Sherman's first grade teacher, Marilyn Barden. *See* School Defendants' Response to Plaintiffs' Motion for Summary Judgment, attached affidavits. All three affiants state that Richard Sherman was never required to participate in the daily pledge and that he was never punished or threatened with punishment because of his refusal to participate. *Id.*

Robert Sherman attempts to rebut these affidavits with his own affidavit in which he states, "Defendant Garrett, principal of the school attended by my son, asks my son to stand with one hand over his heart and participate with the other pupils in reciting the pledge." Affidavit of Robert Sherman, Para. 5. However, Mr. Sherman does not allege in his affidavit that this statement is based on personal knowledge, as is required by Fed. R. Civ. P. 56(e). He does not state that he attended his son's school and saw Principal Garrett asking his son, in particular, to stand during the pledge. Without a properly supported affidavit, plaintiff cannot create a genuine issue of material fact as to whether Principal Garrett, or any other school official directly forced his son to participate in the pledge.

Not only does Mr. Sherman's affidavit fail to create a genuine issue of material fact regarding direct coercion, but it also is insufficient to create a genuine issue of fact regarding indirect coercion. Mr. Sherman may not rest on the allegations of indirect coercion in his complaint, but must put forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). Mr. Sherman states in his affidavit that his "son has been knocked down by other children who are angered at his opposition to pledging" and that his son has suffered "embarrassment and humiliation . . . when the pledge ceremony is conducted."

Affidavit of Robert Sherman, Paragraphs 8, 10. However, Mr. Sherman does not explain how he knows that the reason his son was knocked down was because of his refusal to recite the pledge — Mr. Sherman just expects the court to take his word for it. Similarly, Mr. Sherman does not state how he knows that his son feels embarrassed during the pledge ceremony. If Mr. Sherman's son told him that he was knocked down for not saying the pledge ceremony, Mr. Sherman should have so stated in his affidavit. Mr. Sherman should have also stated that his son is incompetent to make an affidavit on his own behalf and explain why. *See, e.g., United States v. Jones*, 482 F.2d 747, 752 (D.C. Cir. 1973) (test for competency of child witness depends upon intelligence of the child and whether the child understands the difference between truth and falsehood). In short, Mr. Sherman's affidavit, in its present form, does not create a genuine issue of material fact regarding whether Richard Sherman feels indirect coercion to recite the pledge.

Moreover, even if Mr. Sherman had presented competent evidence that his son feels indirectly coerced by peer pressure to recite the pledge, it is doubtful that this would have been sufficient to prove a violation of Richard Sherman's Free Exercise rights. This is because no other court has held that the mere recital of the pledge, without any direct coercion by school officials, violates the First Amendment. In previous cases in which school pledge laws or policies were found to be unconstitutional, the school officials "punished" the children in some way for refusing to participate. *See, e.g., Barnette, supra.* (students who refused to participate in the pledge were expelled and both the students and their parents were subject to prosecution for the student's "unlawful absence"); *Lipp, supra.* (student was "threatened" by school officials when she refused to stand during pledge); *Goetz, Supra.* (students opposed to pledge had to either stand in silence, leave the room, or face suspension); *Banks v. Board of Public Instruction*, 314 F. Supp. 285 (S.D. Fla. 1970) (student suspended for refusing to stand during pledge), *vacated*, 401 U.S. 988 (1971). In the case at bar, it is undisputed

that Richard Sherman was not punished or threatened with punishment by any school official for failing to participate in the pledge. At most, Richard faced indirect pressures because all the other children were conforming and saying the pledge and he was not.

The court recognized in its first opinion that these indirect pressures can be compelling. As Justice Brennan stated in *Abington School District v. Schempp*, 374 U.S. 203, 290 (1963), "[C]hildren are disinclined at this age to step out of line or to flout 'peergroup norms.' " However, Justice Brennan made this remark in the context of a case involving state laws which required reading passages from the Bible or the Lord's Prayer at the beginning of each school day and these laws were found to violate the Establishment Clause. In contrast, reciting the pledge in public schools does not violate the Establishment Clause. Moreover, a state legislature is entitled to establish a curriculum for its schools which includes the teaching of the Pledge of Allegiance to those students who have no religious objections to reciting the pledge. In *Palmer v. Board of Education of the City of Chicago*, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980), the Seventh Circuit held that a public school teacher who was opposed to the pledge and other patriotic exercises on religious grounds could not "require others to submit to her views and to forego a portion of their education they would otherwise be entitled to enjoy." Similarly, even if the Shermans had made a proper showing regarding the peer pressure Richard no doubt feels, the court believes that that alone would not be a sufficient reason to deny the other children their right to learn how to participate in this patriotic exercise. For these reasons, the court grants defendant Hartigan's motion for summary judgment regarding plaintiff's Free Exercise claim.

Equal Protection

Finally, the court finds that there is no genuine issue of fact regarding plaintiff's claim that the Illinois pledge statute violates the Equal Protection Clause of the Fourteenth Amendment and

the court grants defendant Hartigan's motion for summary judgment on this claim as well. In order to determine whether a law is violative of the Equal Protection Clause, a court must first determine what level of scrutiny to apply. *See Faheem-El v. Klincar*, 841 F.2d 712, 727 (7th Cir. 1988). If the law infringes on a fundamental right or discriminates on the basis of a suspect category, the law is reviewed under either a strict or intermediate scrutiny standard. *Id.* "If no fundamental rights or suspect categories are involved, a court must simply determine whether the differential treatment of similarly situated individuals is rationally related to a legitimate state interest." *Id.* The court has already found that the statute does not violate the religion clauses of the First Amendment, so no fundamental right is involved. Also, the law does not discriminate on the basis of any suspect category. Therefore, the court must determine whether the law is rationally related to a legitimate state interest.

As the court stated above, Ill. Rev. Stat. ch. 122, Paragraph 27-3 is rationally related to the legitimate state interest of instilling knowledge of and appreciation for patriotic values in public school students. As the Seventh Circuit stated in *Palmer*, 603 F.2d at 1274, "[t]here is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society." Learning the Pledge of Allegiance can certainly be considered part of a "suitable curriculum" for students. Therefore, the court finds the pledge statute is rationally related to a legitimate state interest. Defendant Hartigan's motion for summary judgment on plaintiff's Equal Protection Clause claim is granted.

Conclusion

For the aforementioned reasons, the court finds that all defendants were proper parties in Count I of the complaint. Therefore, the court denies the school defendants' motion to dismiss Count I against them. The court further finds that there is no genuine issue of material fact as to whether Ill. Rev. Stat. ch. 122, Paragraph 27-3 is constitutional under the First and

Fourteenth Amendments to the Constitution. The court grants summary judgment in favor of all defendants and denies plaintiffs' motion for summary judgment.

ENTER:

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Ann Claire Williams, Judge
United States District Court

Dated: February 28, 1991

APPENDIX C

IN THE

United States District Court for the Northern District of Illinois Eastern Division

ROBERT IAN SHERMAN, for himself and as natural guardian for RICHARD HARRY SHERMAN, a minor son and the SOCIETY OF SEPARATIONISTS, INC.,

Plaintiffs,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, LLOYD DESCARPENTRIE, School District Superintendent, and DR. FERNE GARRETT, Principal of Riley School, Individually and as representatives of the STATE OF ILLINOIS, and NEIL F. HARTIGAN, Attorney General of the State of Illinois,

Defendants.

No. 88 C 9205

Hon. Ann C. Williams, District Judge

MEMORANDUM OPINION AND ORDER

Robert Sherman, on behalf of himself and his minor son, Richard, and the Society of Separationists, Inc. ("the Society") filed suit against Community Consolidated School District 21 of Wheeling Township, School District Superintendent Lloyd Descarpentrie, and Principal Ferne Garrett claiming that the daily recital of the Pledge of Allegiance at Richard's public

elementary school violates their rights under the First and Fourteenth Amendments. Specifically, because the Shermans and the members of the Society are atheists, they claim that the daily recital of the Pledge, which contains the words "under God", in a public school, pursuant to an Illinois statute[1] is an unconstitutional establishment of religion and violates their rights to free expression and equal protection under the law. Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The court denied defendants' motion to dismiss, holding that although plaintiffs probably would not prevail on their Establishment Clause claim, the plaintiffs' complaint did state viable Free Exercise and Equal Protection claims.[2]

After the court's ruling, plaintiffs filed a "re-amended" complaint in which plaintiffs added Illinois Attorney General Neil Hartigan as a defendant. Plaintiffs' most recent complaint seeks a declaratory judgment that Ill.Rev.Stat. ch. 122, ¶ 27-3, which provides for daily recital of the Pledge, is unconstitutional and an injunction against its enforcement. Plaintiffs also seek money damages from each defendant for the alleged violation of plaintiffs' constitutional rights and for the alleged emotional distress plaintiffs have suffered. Defendant Hartigan has filed a

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[1] Ill.Rev.Stat. ch. 122, ¶ 27-3 provides, "The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds."

[2] *See Sherman et al. v. Community Consolidated School District 21 of Wheeling Township, et al.*, 714 F.Supp. 932, 936-37 (N.D.Ill. 1989).

motion to dismiss the "re-amended" complaint pursuant to Federal Rule of Civil Procedure 12(b)(1)[3]. For the following reasons, defendant's motion to dismiss is denied.

STANDING

Defendant Hartigan argues that plaintiffs' complaint should be dismissed because plaintiffs have not suffered "actual injury redressable by the court" and therefore they do not have standing to maintain their suit. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758-59, 70 L.Ed.2d 700 (1982), *citing*, *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39, 96 S.Ct. 1917, 1924-25, 48 L.Ed.2d 450 (1976). In its previous opinion in this case, the court examined the Society's standing to bring suit on behalf of its members and found that the original complaint did not sufficiently allege actual or threatened injury of any members other than the Shermans. The court therefore ordered the Society to supplement the amended complaint with factual allegations to support its standing to sue on behalf of its members. In the "re-amended complaint" plaintiffs simply allege that "[t]here are other members of the Society residing in District 21 who are offended by the Districts's practice of enforcing Ill.Rev.Stat. ch. 122, sec. 27-3". Re-Amended Complaint, ¶ 4. The court finds this general allegation does not show any members other than the Shermans have suffered actual or threatened injuries, "other than the psychological consequence presumably produced by observation of conduct with which one disagrees.. That is not an injury sufficient tc confer

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[3] The Court notes that when ruling on a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1), the court "is not bound to accept as true the allegations of the complaint which tend to establish jurisdiction where a party properly raises a factual question concerning the jurisdiction of the . . . court to proceed with the actions." *Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979). Instead, the court will "look beyond the jurisdictional allegations in the complaint and view whatever evidence has been submitted on the issue in determining whether in fact subject matter jurisdiction exists." *Id.*

standing under Art. III . . . " *Valley Forge College*, 454 U.S. at 485, 102 S.Ct. at 765. Therefore, the court holds the Society does not have standing to bring this suit on behalf of its members.

Defendant Hartigan argues that the Shermans also have not alleged a concrete injury, apparently basing his argument on the affidavits submitted by defendants Descarpentrie and Garrett and Richard's first grade teacher Marilyn Barden. All three affiants state that Richard Sherman was never punished or threatened with punishment for not participating in the Pledge. However, defendant Hartigan ignores this court's previous statement that "school children are impressionable and often susceptible to social influence" and therefore they may feel coerced to recite the Pledge even if they are not punished or threatened with punishment. *Sherman*, 714 F.Supp. at 936-37. Plaintiffs allege in the re-amended complaint and in Robert Sherman's affidavit that Richard felt compelled to say the Pledge because of the embarrassment and loss of friends he suffered by refusing to participate in a ceremony led by his principal and participated in by all his classmates. *See* Re-Amended Complaint, ¶¶ 8, 11-13, 20 and Affidavit of Robert Sherman, ¶¶ 8, 10. These allegations may not ultimately constitute a violation of plaintiffs' rights under the First and Fourteenth Amendments, but they are sufficient to confer standing on the Shermans to bring this action.

RIPENESS

Defendant Hartigan next argues that plaintiffs' complaint should be dismissed because "plaintiffs' claims are not ripe for adjudication." Defendant Hartigan's Memo at 6. Again relying on the affidavits stating that no school official has punished Richard for refusing to say the Pledge, defendant Hartigan concludes "[t]here is no 'threat that the challenged law will be enforced against' any of the plaintiffs." *Id.* This again ignores plaintiffs' claim that defendants' leading of the Pledge, pursuant to the statute, is a means of compelling recitation of the Pledge. This argument, even if it does not ultimately prevail, shows plaintiffs' claim are ripe for adjudication.

ABSTENTION

Finally, defendant Hartigan argues that this court should abstain from adjudicating plaintiffs' claims because the statute at issue has not been interpreted by any Illinois court and a ruling by an Illinois court may modify or moot the constitutional issue plaintiffs pose. However, "[t]he doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order of the parties to repair to the State court would clearly serve an important countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). "The paradigm of the 'special circumstances' that makes abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional questions." *Babbitt v. United Farm Workers*, 442 U.S. 289, 306, 99 S.Ct. 2301, 2313, 60 L.Ed.2d 895 (1979).

Defendant Hartigan maintains that this case is appropriate for abstention because "an Illinois Court could very well determine that the statutory provision is simply *not* mandatory, thereby avoiding a resolution of the constitutional questions plaintiffs raise." Defendant Hartigan's Memo at 13. The court disagrees that such a ruling by an Illinois court would obviate the need to decide the constitutional question posed by plaintiffs. According to the affidavits submitted by defendants, the statute currently is being applied in a non-mandatory way. Defendants are not openly forcing Richard Sherman to stand, recite or participate in the Pledge. Yet, as the court has noted several times, plaintiffs maintain that having the Pledge led by the principal daily is inherently coercive and therefore violative of plaintiffs' rights. Thus, even if an Illinois court interprets the statute to

exempt children who cannot say the Pledge for religious or political reasons, the court would still have to resolve the question of whether school officials' leading of the Pledge, pursuant to the statute, results in unconstitutional coercion. Because abstention would not avoid the necessity of reaching the constitutional issue and would simply add delay to a case that has already been pending for almost two years, the court will not abstain from deciding plaintiffs' claims.

CONCLUSION

For the aforementioned reasons, defendant Hartigan's motion to dismiss is denied[4]. A status hearing will be held on September 11, 1990 at 9:30 a.m.

Ann C. Williams, District Judge

Date: August 21, 1990

[4] The court notes that in finding plaintiffs' allegations of coercion sufficient to defeat defendant's motion to dismiss, the court construed plaintiffs' pro se complaint and affidavit quite liberally. *See Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988) (pro se complaints must be read liberally). However, when the court considers the parties' summary judgment motions, vague allegations of coercion, unsupported by competent affidavits, will not be sufficient to create a genuine issue of material fact. *See* Federal Rule of Civil Procedure 56(e). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The court did not issue a ruling on the summary judgment motions already filed because the court wishes to have all the summary judgment motions before it in order to decide them simultaneously. Therefore, the court orders defendant Hartigan to file a summary judgment motion by August 31, 1990. Plaintiffs' response is due September 10, 1990 and defendant's reply is due September 17, 1990.

APPENDIX D

IN THE

United States District Court for the Northern District of Illinois Eastern Division

ROBERT SHERMAN, for himself and as natural guardian for his son, RICHARD SHERMAN, and the SOCIETY OF SEPARATIONISTS, INC.,
Plaintiffs,

v.

COMMUNITY CONSOLIDATED SCHOOL DISTRICT 21 OF WHEELING TOWNSHIP, School District Superintendent LLOYD DESCARPENTRIE, and Principal FERNE GARRETT,
Defendants.

No. 88 C 9205

Judge Ann C. Williams

MEMORANDUM OPINION AND ORDER

The plaintiffs Robert Sherman, for himself and as natural guardian for his son, Richard Sherman, and the Society of Separationists, Inc. bring this complaint pursuant to 42 U.S.C. § 1983 alleging that the defendants community Consolidated School District 21 of Wheeling Township, School District Superintendent Lloyd Descarpentrie, and Principal Ferne Garrett violated their rights under the First and Fourteenth Amendments. The plaintiffs also challenge the constitutionality of Ill. Rev. Stat. ch. 122, p 27-3 (1980). The defendants move to dismiss the

plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). The defendants' motion is denied for the following reasons.

I
RULE 12(B)(6)

When ruling on this motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), the court will "take the allegations in the complaint to be true and view them along with the reasonable inferences to be drawn from them in the light most favorable to the plaintiff[s]." *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1984), *cert. denied*, 475 U.S. 1047, 106 S.Ct. 1265, 89 L.Ed.2d 574 (1986). A complaint should be dismissed only when "it appears beyond doubt that the plaintiff is unable to prove any set of facts which would entitle plaintiff to relief." Id. In addition, a "court must construe [pro se] pleading liberally, and mere vagueness or lack of detail does not constitute sufficient grounds for a motion to dismiss."[1] *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir.1985); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir.1988) (*pro se* complaints must be read liberally). Finally, the court notes that "in 'complex cases involving fundamental rights and important questions of public policy, such peremptory treatment [as dismissal] is rarely appropriate.'" *DeMallory v. Cullen*, 855 F.2d 442, 445 (7th Cir.1988), *quoting Rutan v. Republican Party of Illinois*, 848 F.2d 1396, 1414 (7th Cir.1988) (Ripple, J., concurring in part, dissenting in part).

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[1] The plaintiffs were proceeding *pro se* when they drafted and filed their complaint. Although they have now obtained counsel, the initial complaint was not amended by counsel. Consequently, the court will continue to give the plaintiffs' complaint the solicitude accorded to *pro se* pleading.

II
FACTS

The pertinent facts as alleged in the complaint are as follows. Richard Sherman is a first grade student at James Whitcomb Riley Public Elementary School. At 9:05 a.m. Principal Garrett "addresses all classrooms on an intercom system telling them to:

> Please rise for the all-school pledge. I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

Richard is publically asked to stand, put one hand over his heart, and perform this ceremony. Complaint, p 5. The Shermans, who are practicing atheists, are members of the Society of Separationists. The Society is a Maryland corporation licensed to do business in Illinois. The Society "has played a historical role in Church/State separation[,] government-coerced observances and other United State Constitutional issues for many years." *Id.* at p 4.

III
STANDING

The defendants move to dismiss the complaint on a variety of grounds. The defendants first contend the Society does not have standing to pursue this action as a party plaintiff on its own behalf.[2] They are correct. The society itself is not in a position to assert those rights, claimed to be constitutionally protected, which the statute curtails. *Cf. N.A.A.C.P. v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963). The society, therefore, does not suffer the actual or threatened injury required to

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[2] When ruling on this motion to dismiss for want of standing, this court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975).

make out a case or controversy between itself and the defendants within the meaning of Article III. *See Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982); *FMC Corp. v. Boesky*, 852 F.2d 981, 987 (7th Cir.1988). However, the above conclusion does not foreclose the possibility that the Society may be able to bring suit on behalf of its members injured by the challenged conduct. The Society may bring suit on behalf of its members if

> (a) its membership would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1467 (7th Cir.1988).

Given the bare bones nature of the complaint, the court is unable to determine whether the Society has standing to pursue claims on behalf of its membership at this juncture. While it is clear that at least two members of the Society, the Shermans, would have standing to sue in their own right,[3] they are already doing so. It is not clear whether any other Society members would have standing to sue as a consequence of suffering actual or threatened injuries. *Cf. O'Hair v. White*, 675 F.2d 680, 691 (5th Cir.1982) (Society has standing to sue under a claim where *every* member suffers an individual injury to a fundamental right). In addition, the plaintiffs request, among other things, damages for mental distress and humiliation and punitive damages. This type of relief requires the participation of the individuals who have been harmed. *See Hunt*, 432 U.S. at 333, 97 S.Ct. at 2434 (an

[3] *See School District of Abington Township v. Schempp*, 374 U.S. 203, 224 n. 9, 83 S.Ct. 1560, 1572 n. 9, 10 L.Ed. 2d 844 (1963).

association may properly pursue declaratory, injunctive, or some other form of prospective relief on behalf of its membership). The plaintiffs will be given twenty-one (21) days from the entry of this order to conform their complaint to this court's ruling. The Society is directed to supplement the amended complaints with factual allegations pertinent to the standing question. *See Warth*, 422 U.S. at 501, 95 S.Ct. at 2206. The court will determine whether the Society has standing to pursue this action on behalf of its members after the amended complaint is filed.

IV
ESTABLISHMENT CLAUSE

The plaintiffs contend that Ill.Rev.Stat. ch. 122, p 27-3 violates the Establishment Clause of the First Amendment.[4] The third clause of the statute provides that

> The Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds.

Ill.Rev.Stat. ch. 122, p 27-3. "The Establishment Clause . . . does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether these laws operate directly to coerce non-observing individuals or not." *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1267, 8 L.Ed.2d 601 (1962). In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme court developed a "three-prong test to determine

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[4] The first Amendment of the Constitution provides in pertinent part that

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;

The Establishment and Free Exercise Clauses have been made applicable to the states through the Fourteenth Amendment. *Abington*, 374 U.S. at 214, 83 S.Ct. at 1567; *Edwards v. Aguillard*, 482 U.S. 578, 582 n. 3, 107 S.Ct. at 2576 n. 3 (1987).

whether legislation comports with the Establishment Clause." *Edwards v. Aguillard*, 482 U.S. 578, 583, 107 S.Ct. 2573, 2577, 96 L.Ed.2d 510 (1987). The *Lemon* test is as follows:

> First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement of government with religion.

Id., quoting Lemon, 403 U.S. at 612-13, 91 S.Ct. at 2111.

The state's action must satisfy each prong of the test. *Id.* The court cannot apply the *Lemon* test when resolving this motion to dismiss because an application of the test would involve the court's consideration of matters outside of the pleading. *See, e.g., Edwards*, 482 U.S. at 587, 107 S.Ct. at 2579 (legislative history is considered). However, the failure of the plaintiffs' Establishment Clause claims is all but a foregone conclusion. Several courts have expressly found that the Pledge of Allegiance may be recited in public schools without violating the Establishment clause. *See Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir.1981) ("while public schools may conduct patriotic ceremonies such as the pledge of allegiance, they may not compel participation by children who object on free exercise grounds"); *Smith v. Denny*, 280 F.Supp. 651, 653-54 (E.D.Ca.1968), appeal dismissed, 417 F.2d 614 (9th Cir.1969); *Gavin v. Peoples Natural Gas Co.*, 464 F.Supp.622,627 (W.D.Pa.1979), *vacated on other grounds*, 613 F.2d 482 (3d Cir.1980) (citing *Smith*). In *Smith*, the court characterized the Pledge as a "patriotic exercise[] containing ancillary references to God." *Smith*, 280 F.Supp. at 653.

Other courts have found that the inclusion of the phrase "In God We Trust" on coinage and currency does not violate the Establishment Clause. *See Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970); *Hall v. Bradshaw*, 630 F.2d 1018, 1022 (4th Cir.1980), *cert denied*, 450 U.S. 965, 101 S.Ct. 1480, 67 L.Ed.2d 613 (1981) ("References to the Deity in our ceremonies and our

coinage and seals do not violate the Establishment Clause because they merely reflect his fact of our history and no longer have any potentially entangling theological significance.") in *Aronow*, the Ninth Circuit stated that

> [i]t is quite obvious that the national motto and slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to government sponsorship of a religious exercise.

Aronow, 432 F.2d at 243. Another court held that the singing of the National Anthem by public school children does not violate the Establishment Clause. *Sheldon v. Fannin*, 221 F.Supp. 766, 774 (D.Ariz. 1963). In the course of resolving the issue, the court noted that

> [t]he singing of the National Anthem is not a religious but a patriotic ceremony, intended to inspire devotion to and love of country. Any religious references therein are incidental and expressive only of the faith which as a matter of historical fact has inspired the growth of the nation.

Finally, although the Supreme Court has not expressly ruled on this question, the court has strongly intimated that the recitation of the Pledge by public school students does not violate the Establishment Clause. The Court has repeatedly noted that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, 684, 96 L.Ed. 954 (1952); *Lynch v. Donnelly*, 465 U.S. 668, 675, 104 S.Ct. 1355, 1360, 79 L.Ed.2d 604 (1984). Moreover, "[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674, 104 S.Ct. at 1359. In *Lynch*, the Supreme court listed a series of constitutionally permissible acknowledgement of the role of religion in American life. *See Van Zandt v. Thompson*, 839 F.2d 1214, 1221

(7th Cir.1988) (citing to *Lynch*, 465 U.S. at 676-78, 104 S.Ct. at 1360-62). The pledge was one of the acknowledgements listed. *Lynch*, 465 U.S. at 676, 104 S.Ct. at 1361. The Court explicitly noted how the Pledge incorporated the phrase "one Nation Under God" and is "recited by many thousands of public school children — and adults — every year." *id.* The court has expressed its implicit approval of the Pledge in other cases as well. *See Engel*, 370 U.S. at 435 n. 21, 82 S.Ct. at 1269 n. 21; *Abington*, 374 U.S. at 281, 303-04, 83 S.Ct. at 1614 (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance...may merely recognize the historical fact that our Nation was believed to founded 'under God.' ")

The plaintiffs attempt to rebut this array of cases by attacking the underlying reasoning of some of the decisions. The court is unpersuaded by their contentions. Furthermore, the plaintiffs have cited no other case law in support of their claimed Establishment Clause violation. If the plaintiffs choose to press this claim in their amended complaint, the court will apply the *Lemon* test.

V
FREE EXERCISE CLAUSE

The plaintiffs also contend that Ill.Rev.Stat. ch. 122, 27-3 violates the Free Exercise Clause by compelling Richard Sherman to recite the Pledge of Allegiance. The court finds that this claim is meritorious. "The Free Exercise Clause affords an individual protection from certain forms of government compulsion." *Bowen v. Roy*, 476 U.S. 693, 700, 106 S.Ct. 2147, 2152, 90 L.Ed.2d 735 (1986); *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1070 (6th Cir.1987), *cert. denied*. ____ U.S. ____, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988); *see also Abington*, 374 U.S. at 223, 83 S.Ct. at 1572 (Free Exercise Clause requires compulsion). In the seminal case *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the Supreme Court found that the compulsory flag salute

and pledge required by local authorities was unconstitutional. The Court stated that

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642, 63 S.Ct. at 1187.

The local authorities "transcend[ed] constitutional limitations on their power" by imposing the compulsory flag salute and pledge. *Id.* The holding in *Barnette* has been applied and reaffirmed by numerous lower courts. *See, e.g., Mozert*, 827 F.2d at 1066; *Lanner*, 662 F.2d at 1354; *Lipp v. Morris*, 579 F.2d 843, 835-36 (3d Cir.1978); *Goetz v. Ansell*, 477 F.2d 636, 637-39 (2d Cir.1973); *Frain v. Baron*, 307 F.Supp. 27, 31-34 (E.D.N.Y.1969).

The defendants do not, indeed cannot, challenge the above legal principles. Instead, they attempt to distinguish this case from *Barnette* on the grounds that Richard Sherman was not compelled to recite the Pledge. The defendants' argument is flawed for several reasons. First, the factual allegations of the complaint are sufficient in themselves to suggest compulsion. Robert Sherman, a first grader, must attend school under Illinois law. He is told to stand, put one hand over his heart, and recite the Pledge by his principal each morning. As the Supreme Court has noted, school children are impressionable and often susceptible to social influence. *See School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 383, 105 S.Ct. 3216, 3222, 87 L.Ed.2d 267 (1985); *Abington*, 374 U.S. at 288-90, 291 n. 69, 83 S.Ct. at 1606-07, 1608 n. 69 (Brennan, J., concurring) ("[i]t is also apparent that the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child.") The command of his principal along with fears of "embarrassment, potential loss of business associations (Robert), friends and other sanctions/penalties" compel

Richard to recite the Pledge. Complaint, pp 7-9; *see also Abington*, 374 U.S. at 290, 83 S.Ct. at 1607 (Brennan, J., concurring) ("even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheist or nonconformists.")

Moreover, the statute requires pupils to recite the Pledge in clear and unambiguous prose. Thus, the statutory terms are coercive. *Cf. Bowen*, 476 U.S. at 704, 106 S.Ct. at 2154 (statute that requires the submission of a social security number as a prerequisite for obtaining benefits is compulsive.) The defendants contend that the legislature's failure to include sanctions for non-compliance renders the statue non-compulsive. The plaintiffs, however, note that Illinois law allows school boards to suspend or expel pupils for misconduct. *See* Ill.Rev.Stat. ch. 122, p 10-22.6. While "misconduct" is not explicitly defined, the failure to obey the express command of a state statute would seem to fall within any definition of the terms. As a result, it is conceivable that the younger Sherman could be punished under Illinois law for his failure to comply with the statute. The defendants also contend that Richard has always been free to remain seated quietly at his desk during the recitation of the Pledge. The court will not consider this assertion because it is, quite naturally, not included in the plaintiffs' complaint. Furthermore, the statute by implication negates any such right. Consequently, the court finds that the plaintiffs have stated a claim for violation of the Free Exercise Clause.

VI
EQUAL PROTECTION CLAUSE

The plaintiffs further challenge Ill.Rev.Stat. ch. 122, p 27-3 on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause "provides that no State shall 'deny any person within its jurisdiction equal protection of the law.'" *Faheem-El v. Klincar*, 841 F.2d 712,

727 (7th Cir.1988), *quoting* U.S. Const.Amend.XIV. When making its equal protection analysis, this court must first determine whether the state legislation "infringes upon a fundamental right or discriminates on the basis of a suspect category." *Id.* In this case, the plaintiffs assert that the statute infringes on their First Amendment rights. As stated above, the court has found that the challenged statute may violate the plaintiffs' rights as guaranteed by the Free Exercise Clause. "When State laws impinge on personal rights protected by the Constitution," they may be "sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904, 906 n. 6, 106 S.Ct. 2317,2322, n. 6, 90 L.Ed.2d 899 (1986); *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969); *see also Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (2d Cir.1975) (Strict scrutiny applicable when an ordinance burdens First Amendment expression rights). Thus, the plaintiffs' equal protection challenge may also be meritorious and will not be dismissed.

VII
PUNITIVE DAMAGES

The Defendants move to strike the plaintiffs' prayer for punitive damages pursuant to Federal Rule of Civil Procedure 12(f). The defendants' motion is granted for the following reasons. Under Illinois law, "punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 359 (Ill.1978). In addition, "the preliminary question of whether the facts of a particular case justify the imposition of punitive damages is properly on of law." *Id.*; *West v. Western Casualty and Surety Co.*, 846 F.2d 387, 398 (7th Cir.1988). In this case, there are no allegations which indicate

that the defendants acted in a sufficiently egregious manner as to warrant the imposition of punitive damages.[5] Consequently, the plaintiffs' prayer for punitive damages will be stricken.

VIII
QUALIFIED IMMUNITY

The defendants Descarpentrie and Garrett also move for dismissal of the action against them in their individual capacities on the grounds that they are entitled to good faith immunity from liability. Qualified immunity, as an affirmative defense, will be an appropriate ground for dismissal if it "clearly appears on the face of the complaint." *Quiller v. Barclays American/Credit, Inc.*, 727 F.2d 1067, 1069 (11th Cir.1984), *adhered to*, 764 F.2d 1400 (11th Cir.1985) (en banc), *cert. denied*, 476 U.S. 1124, 106 S.Ct. 1992, 90 L.Ed.2d 673 (1986); *Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir.) (en banc), *cert. denied*, ____ U.S. ____, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988) (qualified immunity is an affirmative defense). The defendants' qualified immunity defense does not appear on the face of the complaint. Moreover, qualified immunity determinations are more appropriately made in the summary judgment context. *Rakovich*, 850 F.2d at 1205-06. Accordingly, the court will resolve the immunity issue in the context of the parties' summary judgment motions.

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[5] The court notes that the defendant school district, a quasi-municipal corporation, would be immune from punitive damages in any event. *People v. Furman*, 26 Ill.2d 334, 186 N.E.2d 262, 263 (Ill.1962) (School districts are quasi-municipal corporations); *People v. Wood*, 411 Ill. 514, 104 N.E.2d 800, 805 (Ill.1952) (same); *People v. Deatherage*, 401 Ill. 25, 81 N.E.2d 581, 592 (Ill. 1948) ("A school district is a quasi-municipal corporation, and analogous to any other municipal corporation created under legislative enablement laws.") *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 2762, 69 L.Ed.2d 616 (1981) (Municipal corporations are immune from punitive damages).

CONCLUSION

For the foregoing reasons, the court denies the defendants' motion to dismiss. The plaintiffs are given twenty-one (21) days from the entry of this order to amend their complaint to supplement and focus their factual allegations.

Ann C. Williams, District Judge

May 12, 1989